INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
2401 12th Street NW B Suite 214S
Albuquerque, NM 87104
Phone: 505-247-1447 Fax: 505-247-1449 E-mail: itma@flash.net

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
JUNE 22, 2000

HEARING ON PROPOSED AMENDMENTS TO THE 1994 INDIAN TRUST FUND MANAGEMENT REFORM ACT SUBMITTED BY THE INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

Mr. Chairman and Members of the Committee, my name is Gregg Bourland. My Sioux name is AEagleswatchoverhim@. I am chairman of the Cheyenne River Sioux Tribe and chairman of the Intertribal Monitoring Association on Indian Trust Funds (ITMA). On behalf of the forty tribes that comprise the membership of ITMA, I would like to thank the Committee for this opportunity to testify today on a very important proposal to amend the 1994 Trust Fund Management Reform Act.

ITMA was established by a group of tribes in 1990 to advocate for 1) the reform of the management of Indian trust funds and trust resources by the Federal government, so that those assets and funds finally would be managed according to the high fiduciary standards required of a trustee; and 2) compensation to the tribes and individual Indians who own trust funds and trust resources for the losses they suffered as a result of the Government=s gross mismanagement of those funds and resources in the past.

Since its creation ten years ago, ITMA has not spent its time, as we originally had hoped, working with the Interior Department to find solutions to the complex issues of trust reform and trust settlement. Instead, the bulk of our time has been spent in constant battle with the Interior and Justice Departments to try to get them to do what is right. For the first seven years, the fight was to get them to do anything. For the past three years, the fight has been to keep these agencies from implementing trust reform and

settlement in ways that are failing to meet trust standards, that are designed primarily to benefit those agencies at the expense of the Indian trust beneficiaries, and that are designed to avoid Federal accountability for its years of gross mismanagement.

This Committee, other Committees of Congress, GAO and the Federal courts have also been compelled to devote an enormous amount of time and energy to these same kinds of frustrating battles. We have been told that many of the dedicated BIA mid-level employees in the field are also frustrated by the Department=s emphasis on show rather than on substance. The situation is perhaps best summed up by Judge Lamberth in the following quote from his April 4, 2000 decision in the *Cobell* case, in which he said:

> Despite all of the personal assurances they [Secretary Babbitt and Assistant Secretary Gover] gave this Court about the priority they were placing on trust reform, the facts brought to light in this proceeding provide overwhelming proof to the Court that the defendants simply continue to provide more empty promises...

ITMA, Congress, GAO, the courts and the BIA employees in the field cannot and should not have to continue to devote the bulk of our time and energy to this continued battle with the Departments to keep them from passing off their Aempty promises@ as real trust reform and settlement. However, based on a growing record, it appears that this is what the future will hold, so long as these agencies remain in control of the trust reform and trust settlement efforts. After ten years it is abundantly clear that the Interior and Justice Departments are institutionally incapable of reforming trust management or fairly settling the Government=s liability for long-running breach of trust. As we have been advised over and over again, it is a basic rule of management that when an institution has been grossly mismanaged, the leadership in that institution is incapable of truly reforming that institution. All of the experts will tell you that if you want true reform, it must be done from the outside.

It is time for a change. Senator Campbell=s Discussion Draft will produce such a change, by transferring responsibility for trust reform and trust settlement to an independent entity called the Indian Trust Resolution Corporation (ITRC), modeled on the Resolution Trust Corporation which successful resolved the S&L crisis. While there clearly are some risks involved in launching in a new direction and creating new entities, ITMA has

concluded that the risks need to be taken, given the frustrating experiences with the Interior and Justice Departments over the past ten years. When surgeons perform open-heart surgery, they remove the heart fully from the chest cavity, repair it and then replace it. The same kind of radical surgery is needed in the trust area if the trust system is ever going to truly be repaired.

For these reasons, ITMA strongly endorses the Title I of the Discussion Draft, subject to continuing consultation between the Committee and ITMA and tribes on changes needed to strengthen the Draft bill. Attached to this testimony are ITMA=s proposed changes. We are pleased to report that we have been meeting with Committee staff and are optimistic that, with just a little more work among the Committee, ITMA and the Tribes, the Draft will soon be ready for ITMA=s unequivocal endorsement. We are committed to working with the Committee to make this happen expeditiously so the bill can be enacted this year.

While we recognize that this is a short legislative session, we think it is critical that this bill be enacted this year, for two reasons:

1) The $150 million plus that Congress has appropriated for trust fund reform appears to be in danger of producing seriously flawed trust systems, regulations, and policies. As a result, if the ITRC is not quickly placed in charge, Congress may find that much of the money has been wasted and much of the work will have to be done over again.

2) The BIA is trying to rush through, by the end of this year, revised trust regulations that many tribal leaders have determined to be fatally flawed because they fail to begin to establish true trust standards. (This is discussed in greater detail below.) Unless the ITRC is put in place this year, these regulations will be promulgated as final regulations despite the strong opposition of the owners of the land and funds that will be managed pursuant to those regulations and in violation of the principles of Self-determination.

I had the honor of testifying at the last hearing the late Congressman Synar ever chaired, in October of 1994. Fittingly, it was a hearing on the 1994 Trust Fund Management Reform Act bill. It was the willingness of Congressman Synar, along with Senator Inouye and many other members of this Congress, to stand up to the Interior Department in 1994 that enabled that Act to pass. Senator Campbell, in drafting and circulating the Discussion Draft, you have

assumed Congressman=s Snyar=s mantle. On behalf of the large group of tribal leaders that voted unanimously to support this Draft at our May 17th tribal leaders meeting. I would like to express my deep appreciation to you for your courage and creativity in putting this draft before the Indian people.

This reference to Congressman Synar is particularly appropriate because the Discussion Draft effectively closes the circle that was begun in 1994. Even back then, Congress and ITMA recognized that if trust reform were to happen properly, responsibility and authority had to be removed from the agencies that had created the problem and placed in an entity with trust expertise and independence. ITMA argued that this entity had to be independent of the Secretary. However, Secretary Babbitt told the Congress that his Department could get it done internally and threatened to get the President to veto legislation that took the responsibility out of Interior=s control. As a result, the Office of Special Trustee was placed in the Department and subject to the authority of the Secretary.

Six years later, the results are in on whether Interior is capable of reforming itself. It is clear that the Secretary was wrong. Other than the Department itself, everyone who has followed the Department=s activities over the past six years has concluded the Department is failing in its reform and settlement efforts and is incapable of reforming itself. I went back and read my testimony from that 1994 hearing before Congressman Synar. Then, as now, the Department was stonewalling, unresponsive and looking for every possible way to avoid accountability in its role as trustee. Today, the only choices before Congress are either: 1) moving responsibility for trust reform and settlement into an independent entity such as the ITRC or 2) accepting that Indian tribes and individual Indians will never have their trust funds and resources managed according to trust standards and will never obtain a fair settlement for the losses they suffered as a result of Federal mismanagement. The second option is unacceptable to ITMA and hopefully to Congress and all fair minded people. The Department=s interest in protecting its bureaucratic turf is not a sufficient reason to deny tribes and individual Indians their trust rights.

In the *Cobell* litigation, the plaintiffs asked the court to appoint a special master to assume responsibility for overseeing the reform effort, in light of the Interior Department=s continuing Aempty promises@. The court said that the decision on whether to appoint an independent entity to oversee reform rests with Congress and that the 1994 Act did not go that far. The court effectively

invited the Congress to take this step. Thus, all of the parties most familiar with this situation **B** the court, the IIM account holders, and the tribes **B** are turning to the Congress for help and asking it to complete the job it began in 1994.

Two recent actions by the Interior Department, in concert with the Justice Department, vividly demonstrate why these Departments have forfeited their right to retain continued responsibility for trust settlement and trust reform, such that this responsibility must be transferred to the ITRC:

> Settlement. Several months ago, Interior officials provided ITMA with the Administration=s proposed legislation for settling with tribes on the losses they suffered from the Government=s mismanagement of their trust funds. This proposed bill, drafted by the Interior and Justice Departments, is nothing short of unconscionable, replete with provisions carefully crafted to cheat us of our rights and our money. One would have to go back 150 years to the old treaty-making days to find a Government document that is so unfair and duplicitous.
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> Perhaps the most deceptive provisions are the ones requiring tribes to surrender their rights to probably 95% of the money they lost as a result of Federal mismanagement in order to receive 5% of what they lost. It is generally agreed that tribes suffered their greatest losses as a result of the Department=s failure to collect the amounts due on Indian leases, given the huge hole created by the absence of an accounts receivable system. However, because there was no accounts receivable system, and because the records needed to re-create one had been destroyed or lost, the Arthur Andersen reconciliation concluded that it could make no findings about how much money the BIA failed to collected from parties that had leased tribal assets. As a result, Arthur Andersen reconciliation could make only very narrow findings, primarily about how much tribes lost because of clerical errors that occurred when entries were made in the general ledger. This represent a very small percentage of the overall losses tribes suffered as a result of Federal mismanagement. Yet the Department=s proposed settlement bill would, by legislation, Adeem@ that the Arthur Andersen reconciliation had satisfied the Department=s obligation to produce an accounting on the accounts receivable issue. Based on this fictitious addition to Arthur Andersen=s reconciliation, the Department=s settlement legislation contains a presumption that the Department had collected every penny

due tribes from every lease, and places the burden of proof on the tribe to prove how much money was not collected -- an extremely difficult, if not impossible task, as Arthur Andersen already concluded. As a result, the Department=s bill would allow the Federal Government to sneak out of the bulk of its liability to tribes for gross mismanagement of their trust funds without having to pay the tribes a penny. For the Interior and Justice Departments to provide tribes with a draft bill that is so unconscionable is clear evidence that they cannot be trusted to properly and fairly settle the trust accounts. The responsibility must be given to a third party such as the ITRC.

Trust Reform. The trust regulations are really the heart of the trust relationship because they define how the trust responsibility is to be met. TAAMS is a computer system that helps to carry out the requirements set out in the regulations. Despite the importance of the regulations, the BIA is trying to steamroll fundamentally flawed Leasing, Grazing, Trust Fund
Management and Probate regulations through the process, despite strenuous objections from the tribes. The tribes have concluded that the draft regulations the Department has put forward are simply a rehash of the existing regulations, designed primarily to allow the BIA to retain its power and to avoid accountability by failing to adequately define BIA=s responsibilities as trustee. For example, they fail to put in place the rules for an accounts receivable system, the biggest hole in the existing regulations. They also fail to reflect the requirements and policies of the Self-Determination and Self-Governance Acts. When the tribes concluded that the regulations needed to be rewritten from scratch and asked for more time to draft the regulations properly, the BIA denied their request and is proceeding to publish the regulations this month. This is a direct violation of Executive Order 113804, which specifically recommends an agency adopt a negotiated rulemaking or other consensual process on matters relating to trust resources. The Department=s response, that tribes can comment once the proposed regulations have been published is inappropriate in light of the Executive Order, the Self-Determination policy, and the fact the tribes are the beneficial owners of the trust funds and resources. Therefore, another reason we are supporting the Discussion Draft is that it is our hope that before the BIA ever gets to publish these totally inadequate regulations in final form, Congress will have transferred responsibility for

this critical task to the Indian Trust Resolution Corporation, so they will be done right.

There is another reason the Discussion Draft needs to be enacted into law this year. One of the first questions reporters covering the trust issues ask us is Awhat is the Government hiding?@ The reporters sense that the Interior Department=s behavior B the stonewalling, misleading the Federal courts, the refusal to partner with tribes on solving this problem B the willingness of senior officials to continually open themselves up to scathing criticisms by the court, the media, and Congress, simply does not make rational sense. The reporters point out that it would have been so easy for Secretary Babbitt to say that this did not happen on my watch and then open up the process. The reporters and other observers feel that the only explanation for the Department=s behavior is that it is trying to hide a very deep and dark secret. ITMA has no way to determine if they are right. If they are, only an independent entity such as the ITRC will be able to ferret it out. If they are wrong, only an independent entity will be able to credibly tell the public and the Indian community that there is no deep dark hidden secret. The Interior Department no longer has credibility on this issue in the Congress, the courts, among the tribes or among the public.

As in 1994, it is probable that Secretary Babbitt will urge President Clinton to veto Title I of the Discussion Draft. As the President considers Secretary Babbitt=s likely veto request, we would urge him to compare the Federal government=s approach to Indian trust fund settlement with the admirable approach the President took in settling the claims of the Holocaust victims against the Swiss Banks. In the latter situation, President Clinton did not trust the Swiss Banks to accurately determine their own liability. Instead the President created an independent commission headed by the highly respected Paul Volker, to carry out its own independent investigations and eventually negotiate a settlement. The Holocaust bank account and the Indian trust situations are very similar. The only major difference is that in the former case, the guilty party was a group of foreign banks, while in the Indian trust situation, the Abank@ that cannot account for the dollars of a victimized group is the United States Government. We hope that the President will not be guilty of a double standard and will recognize that there is the same need for an independent entity in the Indian trust situation as there was in the case of the Holocaust victims. The ITRC provides that independent entity.

In the same vein but more recently, the White House announced this month that agreement had been reached with Germany to create a $5 billion fund to compensate persons who were used as slave laborers during the Nazi era. The settlement resulted from the intensive efforts by a Deputy Secretary of State, backed by strong moral pressure from the White House. By contrast, in the case of the Indian trust settlement effort, a Secretary, an Assistant Secretary and high level Justice officials have devoted their intensive efforts to the development of the duplicitous settlement legislation discussed above. Imagine the outrage if the slave labor settlement required the victims to produce wage statements to prove they had been used as slave laborers. Yet that is effectively the equivalent of what the Department=s bill requires of Indian trust beneficiaries.

The true test of a nation=s morality is not that it takes the more high road when some other party is at fault. That is easy. The true test is if that nation takes the high road when it is the guilty party. The Indian trust beneficiaries are still waiting for the White House to bring the same moral standards to the Indian trust situation that it has brought to situations in which some other country, be it Switzerland or Germany, were at fault. That will show whether or not we operate under a double standard.

ITMA has recommended a number of what we believe will be improvements to Title I of the Discussion Draft. These proposed changes are detailed in Attachment A to this testimony. Also, at ITMA=s May 17, 2000 Tribal Leaders meeting, the tribal leaders unanimously supported Title II of the Discussion Draft, which is a revised version of S. 739 introduced last year by Senators Murkowski and Campbell. After S. 739 was introduced last year, ITMA endorsed the bill in concept, subject to certain revisions ITMA felt were needed. We were pleased to see that all of our requested changes were incorporated into Title II of the Discussion Draft, such that the bill meets the conditions ITMA established for its support. We do have several additional changes to Title IV; these are also set out in Attachment A to this testimony.

Title II, like Title I, closes the circle. When the 1994 Trust Fund Reform Act bill was first introduced, it contained provisions that would have provided tribes with a variety of options for the investment of their trust funds while allowing them to keep those funds in trust status. Secretary Babbitt opposed those provisions, saying the money should either stay in OTFM or leave trust status completely, and successfully pressured Congress to remove them from the 1994 bill. As a result, six more years have passed in which Indian trust

beneficiaries have unnecessarily received the lowest yields of any trust beneficiaries. Title II would correct that problem.

Also Title II would help promote economic activity on reservations, by requiring that, in contracting out the investment functions, the Secretary give preference to Indian-owned financial institutions and requiring all contracting institutions to invest some of the funds in ways that benefit the Indian community, consistent with their trust responsibility. Right now the $3 billion in Indian trust funds produces no economic benefit to the Indian community. As a very conservative example of what Title II could do to help Indian country, a bank could take a portion of the trust funds it is managing and invest them in Section 184 100% government guaranteed housing mortgages. The interest rates on the mortgages will be at least as good as the Treasuries that OTFM is now buying, the investment is guaranteed, and it will help to promote housing development on reservations.

As the final part of the ITMA testimony, I would like to highlight a few of the proposed changes to Titles I and II that are contained in Attachment A to this testimony:

A. Title I

1. The Discussion Draft proposes that OST and OTFM be transferred to the ITRC, along with such staff from the BIA that the ITRC concludes it needs. ITMA recommends that the legislation go the whole way, by requiring that all Interior offices carrying out trust functions be transferred to the ITRC, pursuant to a transition plan developed CEO. The ITRC will have a much greater chance of achieving success in reforming the trust systems if it has day-to-day authority over all of the trust activities, whether they are located in the BIA, BLM, MMS or other Interior agencies. In those exceptional cases in which a trust function is so intertwined with a non-trust function that it cannot be separated, the bill should require the Secretary and the CEO of the ITRC to develop an MOU to handle the situation.

2. ITMA does not believe that the bill should contain a presumption that the trust functions will be returned to the Interior Department once the reform and the settlement are completed. We think that decision should be left to the Congress and Indian leadership in place at that time.

3. It would be incorrect to conclude that all of the blame for the problems over the past ten years rests just with the Interior Department. It has become increasingly clear that the Department of Justice has played a major role in the stonewalling and unconscionable actions that have frustrated Congress, GAO, the courts, the BIA field employees, and ITMA. For example, it is believed Justice shares major responsibility for the unconscionable Settlement proposal discussed above. It is therefore important for the Draft to include language that excludes the Justice Department from any role in the activities or decisions of the Indian Trust Resolution Corporation. Among other things, this means the Corporation needs the power to sue under its own authority rather than having to rely on Justice attorneys. It also means that Justice must not have any role in approving the settlements the Corporation reaches with the account holders, including no approval of settlements that will be paid for out of the Judgement Claims Fund (see recommendation __ below.)

(ITMA also urges the Committee to schedule a hearing on what appears to be a deliberate and concerted effort by the Justice Department to use inappropriate tactics to stonewall Indian trust lawsuits. The *Cobell* case is just one of many breach of trust lawsuits in which Federal officials or Justice attorneys have been found to be in contempt of court for engaging in inappropriate actions to obstruct the litigation.)

4. The Treasury Department is also responsible for a portion of the mismanagement of trust funds and thus needs to be subject to the authority of the ITRC. While we do not recommend that the ITRC be given direct authority over Treasury, we do recommend that the ITRC be given the authority to approve all Treasury regulations, policies and procedures involving the management of Indian trust funds and the authority to require Treasury to revise any existing regulations, policies or procedures that do not meet trust standards.

5. In regard to settlement of the Government=s trust fund liability, we have recommended that instead of requiring the ITRC to conduct a Areconciliation@ or Aaccounting, the bill should require the ITRC to cut to the chase **B** instructing it to use appropriate rough justice procedures to reach agreement with the account holders on what their balance should be, and then to make the account holder whole for the difference between the amount now it that account and the correct balance. Arthur Andersen spent over $20 million dollars proving that a meaningful reconciliation is largely impossible

because too many documents were destroyed or never were created. Under our recommendation the legislation would give the ITRC the flexibility to use such alternative accounting techniques as it deems appropriate for settling the accounts, without going through a lot of meaningless paper shuffling. Also, the bill should make it clear that this process is to begin on the date the account was opened since, from the day the first trust account was opened, neither tribes nor IIM account holders have ever received any form of the trust accounting they are entitled to

6. In regard to the source of the dollars to settle the accounts, ITMA believes the proper source should be the Judgement Claims Fund in Treasury, which is used to pay for the resolution of other legal claims against the United States. The trust fund settlements are legal claims and they should not have to be funded out of appropriations, which are difficult to come by and which will ultimately be taken from other Indian programs.

7. The bill only addresses settlement of the losses caused by the Federal government=s mismanagement of the trust funds. It does not address losses caused by the Government=s mismanagement of the trust assets. This latter issue is much more complex and is likely to involve more substantial liability than exists in the trust fund area. Presently, it would be difficult to say with any certainty how settlement for trust assets should be achieved. Despite the urging of this Committee, the Interior Department has largely terminated a joint effort it had begun with ITMA to develop a mechanism for settling the trust asset liability issue. Instead they have told the tribes that the solution is for the tribes to file suit, (perhaps knowing full well that the Justice Department will use all of the inappropriate tactics it has used in the *Cobell* litigation to delay such suits for years. Yet this is a problem that needs a legislative solution. ITMA therefore recommends that the Discussion Draft be amended to authorize the ITRC to develop a proposed legislation that would set out a settlement approach for the trust assets area that it would submit to Congress for its consideration within one year after the ITRC is established. For example, it could propose legislation that provide for the use of estimates and other alternative damage assessment methodologies and propose some special procedure outside the court system for reaching settlement in a faster and less expensive way. The language we have proposed would require the ITRC to give the tribes several optional approaches for settling their claims, since each tribe=s situation in regard to trust asset losses is different. It would also permit the class of IIM account holders to opt into this proposed

procedure if they decided that would be preferable to the litigation approach they are presently following.

Also, a tribe or IIM account holder that is unwilling or unable to reach settlement with the ITRC should retain its right to litigate. While nothing in the draft specifically takes away that right, the bill should make this clear. For example, it would permit the class action plaintiffs in the *Cobell* litigation to have the option of continuing to litigate the settlement issue or use ITRC=s procedure.

8. In regard to the structure of the ITRC and Oversight Board, we are concerned that it could take a long time for the President to appoint the CEO and the independent members of the Oversight Board. This would delay the start-up of the ITRC, which would be extremely destructive because it would let the Interior Department continue to squander the funds Congress has appropriated for trust reform. ITMA has therefore recommended that the Draft provide that, pending the President=s appointment of the CEO, the Special Trustee serve as the acting CEO. Similarly, pending the appointment of the five independent members of the Oversight Board, ITMA has recommended that the five tribal representatives on the Special Trustee=s Advisory Board serve as the five independent members. Because the Special Trustee and the Advisory Board members are Presidential Appointees, they can be given new authorities by legislation that are similar to their existing ones, without running into Constitutional problems. An alternative would be to simply designate those five Advisory Board members as the permanent independent members of the Oversight Board. We have also recommended that the CEO have a five year term rather than serve at the pleasure of the President, so that there will be continuity during changes of Administration.

Highlights of ITMA=s Proposed Changes to Title II (S. 739 as revised)

1. The Discussion Draft provides that investment of a tribe=s trust funds will be contracted out unless the tribe affirmatively requests that the investment function remains with OTFM. ITMA is recommending a two part approach to this critical issue. If the legislation creating the ITRC is enacted, such that OTFM would be under the ITRC, then ITMA would support language that reverse the burden; that is, providing that the investment functions remain within OTFM unless the tribe affirmatively requested that it be outsourced to a private financial institution. Linked

to that would be a provision requiring that the ITRC and OTFM work with each trust fund tribe to help it develop a plan for the investment of its funds. In this endeavor, these two agencies would help the tribe to decide which of the several investment management options is the most appropriate one for that tribe **B** staying with OTFM, taking the funds out of trust under the 1994 Trust Fund Reform Act, keeping it in trust but contracting the investment functions to a private financial institution, using the Self-determination or Self-governance Act, etc.

On the other hand, if the ITRC legislation is not enacted and Title II goes through Congress as a stand-alone bill, such that OTFM remains within the Interior Department, then it is ITMA=s recommendation that the bill stay as it is; that is, provide that the investment of a tribe=s funds be contracted out unless the tribe affirmatively requests that it remain within OTFM.

Also, at the request of the plaintiffs in the Cobell litigation, the Committee recommends to the Board that ITMA propose that IIM account holders be excluded from the bill for the time being, until the litigation is resolved.

2. Assistant Secretary Gover told ITMA that he could support legislation (not necessarily Title II as drafted) that gave tribes private sector options for the investment of their trust funds, so long as the United States= liability was reduced accordingly. We agree and have drafted proposed language that would do so.

Thank you for this opportunity to testify. ITMA is committed to working with the Committee in any way possible to ensure this proposed legislation is enacted this year.

ATTACHMENT A

PROPOSED CHANGES TO THE DISCUSSION DRAFT, TITLES I AND II, THAT WOULD AMEND THE 1994 INDIAN TRUST FUND MANAGEMENT REFORM ACT

Proposed Revisions: (Text with ~~lines through it~~ is language in the Discussion Draft bill recommended to be deleted. Text that is underlined represents language recommend to be added.)

PART I. REVISIONS TO TITLE I OF THE DISCUSSION DRAFT

1. Revise section 103 ACongressional Declaration of Policy@ so it reads as follows:

It is the policy of this title to establish a Federal agency that will promptly ~~reconcile~~ provide an honorable resolution of trust fund account balances for all Indian trust fund accounts, make whole account holders for monies that cannot be accounted for, and modernize all Indian trust fund accounting systems and all Indian trust asset management systems, with the full cooperation of the Secretary of the Interior and consistent with the trust responsibility of the United States to Indian tribes and individual Indians.@

Explanation: See paragraph 2 below.

2. Revise Section 105(b)(2)((A)[Settlement] so it reads as follows:

A(A)Notwithstanding any other law, including any statute of limitations, expeditiously negotiate a good faith settlement with Indian tribes and individual Indian account holders on account balances, beginning from the time the accounts were first established, and make account holders whole for monies that cannot be accounted for, using such alternative accounting procedures as are fair and appropriate given that many of the documents necessary to perform a standard trust accounting were destroyed or were never created by the United States acting in its capacity as trustee, and maintain the integrity of the trust fund accounts and other trust assets;@

Explanation:

It is probable that any useful form of reconcilation or even accounting cannot be accomplished. Arthur Andersen spent over $21 million producing a document that just scratches the surface. Therefore, it is recommended that the ITRC focus on settlement, in which agreed-upon account balances will be negotiated , using whatever approaches will allow rough justice to be achieved in a fast and inexpensive manner. Any amounts the account holders lost as a result of the Federal Government=s mismanagement of those funds will be restored to the account . It also makes clear that the process starts at the point at which the accounts were first created, since neither tribes nor IIM account holders have ever received the trust accounting to which they have been entitled over the years.

3.Change Section 105(b)(2)(B) to read as follows:

A((B) use amounts ~~appropriated under this title~~ previously appropriated under section 1304 of Title 31 of the United States Code (the Judgement Claims Fund) to adjust and reconcile each tribal or individual trust account and settle or compromise claims on behalf of the United States raised by Tribal trust or individual account holders in response to such adjustments or reconciliations. Notwithstanding any other provision of law, such settlements or compromises shall not be subject to approval by the Attorney General;@

Explanation:

In regard to the source of the dollars to settle the accounts, ITMA believes the proper source should be the Judgement Claims Fund in Treasury, which is used to pay for the resolution of other legal claims against the United States. The trust fund settlements are legal claims and they should not have to be funded out of appropriations, which are difficult to come by and which will ultimately be taken from other Indian programs.

Also, not all of the blame for the problems over the past ten years rests just with the Interior Department. It has become increasingly clear that the Department of Justice has played a major role in policies designed to ensure the Federal government is never held fairly accountable for the losses Indian tribes and individual Indians have suffered as a result of the Government=s trust mismanagement. For example, it is believed that it is the Justice

Department shares in the responsibility for the unconscionable Settlement proposal Interior submitted to tribes this Spring. It is therefore important for the Draft to exclude the Justice Department from any role in the activities or decisions of the Trust Resolution Corporation. Among other things, this means the Corporation needs the power to sue under its own authority rather than having to rely on Justice attorneys. It also means that Justice must not have any role in approving the settlements the Corporation reaches with the account holders, even though the Attorney General usually has to approve settlements that are paid for out of the Judgement Claims Fund.
4. Having the ITRC take over all of the Interior Offices and Strengthening the ITRC=s Self-Determination role.

4a. Revise Section105(b)(2(C) [Management of Trust Fund and Trust Asset Programs] to read as follows:

A(C) Immediately assume responsibility for the management and administration of all trust fund accounts and other trust assets of Indian tribes and individual Indians and take such steps as are necessary to manage and administer such trust fund accounts and trust assets in a manner that meets or exceeds common law fiduciary standards and that permits and actively assists Indian tribes to assume certain programs, functions, services, and activities pursuant to the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) @ and the Indian Self-Governance Act (25 U.S.C. 458aa et seq.), but such assumptions shall be subject to the limitations set forth in Title ~~II~~ I of the American Indian Trust Fund Management Reform Act of 1994...

4b. Revise Section 105(d)(2) as follows:

(2) Transfer of Interior Department ~~Staff~~ Offices. BThe ~~staff of the~~ Office of Trust Funds Management, the Office of the Special Trustee, along with ~~staff selected by the chief executive office within the Bureau of Indian Affairs~~ all other offices or functions in the Department of the Interior with responsibility for the management of Indian trust funds or trust assets, shall be transferred to the Corporation to work under the direction of the chief executive officer towards the fulfillment of the duties of the Corporation. Such transfer shall be carried out pursuant to a transition plan developed by the chief executive officer in coordination with the Secretary. The Secretary shall cooperate fully with the chief executive officer during the development and implementation of the transition plan. Pending the transfer of an office or function pursuant to

this provision, the Corporation shall approve, and may revise, all regulations, policies, procedures, major decisions, and personnel actions at such offices and functions and take such other actions as the chief executive officer deems necessary to assure trust funds and trust assets are managed in a manner that meets or exceeds common law trust standards. If the chief executive officer determines that there are trust functions in the Interior Department which cannot be transferred because they cannot be separated from non-trust functions, he shall enter into a Memorandum of Understanding with the Secretary that will provide the corporation with the necessary authority to ensure those functions are managed in a manner that equals or exceeds common law trust principles and that is coordinated with the trust functions being managed by the Corporation.

Explanation:
There have been two different general approaches to putting responsibility for trust reform in an entity outside the Interior Department. One approach, following the D.C. Control Board model, would leave the trust programs in Interior but give the outside entity the authority to direct the reform effort. The other approach would transfer the offices and staff now carrying out trust fund and trust asset management from Interior to the new outside entity. The Discussion Draft splits the baby on this issue. It gives the outside entity responsibility for management, transfers OST and OTFM to the ITRC and then leaves it to the CEO of the ITRC to decide what other staff in the BIA to transfer to the ITRC. It is the view of ITMA that this splitting approach is not good management and leaves too much undecided, which makes it difficult to explain to Indian country. If the reform is to be accomplished expeditiously, the entire trust program needs to be moved from Interior to the ITRC. In support of this approach one only needs to look at how much was accomplished at OTFM during the period Paul Homan was able to make reforms at OTFM without interference from the other Interior officials. If offices are left within Interior, experience indicates that the Interior officials and bureaucracy will do everything in their power to thwart real reform and to make the ITRC=s job as difficult as possible. The history of what those officials and bureaucracy did to OST and Paul Homan once he started threatening their turf by proposing a new GSE for trust management, provides an indication of what would happen to the ITRC if it had to depend on Interior for day-today management of the trust programs ITRC was responsible for reforming. The proposed revision therefore would transfer all trust functions, offices and staff to the ITRC.

However, there may be trust functions that are impossible to transfer out of Interior because they are so intertwined with non-trust functions. The proposed revision addresses that by instructing the ITRC and Interior to enter into a MOU for managing such offices, with the ITRC having clear authority of the trust functions.

ITMA recognizes the complexities of drafting and enacting such legislation this year. However, it is critical that some new entity with authority over the reform effort be put in place this year, given the speed with which Interior is rushing through unacceptable regulations and spending money on systems whose effectiveness are suspect and fail to meet trust standards. If legislation is not enacted this year, most likely, with a new Congress and new Administration, it will be two years before any legislation could be enacted. By that time, too much of the damage will have been done and too much of the funds will have been misspent. Therefore, if legislation achieving the full transfer cannot be enacted this year, ITMA would support a fallback to the D.C. Control Board model for this year, with a revisiting of the complete package next year.

ITMA also recommends that the provision on the Self-Determination Act be strengthened through language that instructs the ITRC to actively assist tribes exercise their self-determination rights. We also recommend language that specifically references the Self-Governance Act, (though that may be considered part of the Self-Determination Act). Finally, we think the reference to Title II of the Indian Trust Funds Management Reform Act in this section is incorrect; it probably should be a reference to Title I of that Act.

5.Add a new Section 105(b)(2)(D), which shall read as follows:

"Section 105(b)(2)(D).-- Within one year from the effective date of this Act, develop and submit to Congress, for its consideration, an approach for providing a trust accounting for trust assets and for settling with tribes for the losses they suffered as a result of the United States' mismanagement of their trust assets and failure to properly collect the income from said assets. The approach shall utilize such alternative accounting methodologies deemed appropriate and necessary to minimize the time and cost of achieving settlement, given that many of the documents needed to perform a standard trust accounting have been lost, destroyed or never were created by the United States acting in its capacity as trustee. The approach shall offer tribes with two or more options in light of the varied circumstances of the different tribes. It shall also permit the class of IIM account holders to opt in to the

settlement process if they so choose. Pending action by Congress on its recommended approach, the Corporation is authorized to settle any trust asset claim at the request of an Indian tribe or individual Indian and the provisions of subsection 105(b)(2)(B) [Use of the Judgement Claims Fund] shall be applicable to such settlements @

Explanation:

The bill only addresses settlement of the losses caused by the Federal government=s mismanagement of the trust funds. It does not address losses caused by the Government=s mismanagement of the trust assets. This latter issue is much more complex and likely to involve more substantial liability than exists in the trust fund area. Presently, it would be difficult to say with any certainty how this should be done. Despite the urging of the Committee on Indian Affairs, the Interior Department terminated the joint effort with ITMA to develop a mechanism for reaching closure on this liability, instead telling the tribes that they should file suit, knowing the Justice Department will use all of the inappropriate tactics it has used in the *Cobell* litigation to delay such suits for years. While this is a problem that needs a legislative solution, it is impossible to draft one at this time that would have broad tribal support. It is recommended that the legislation be amended to authorize the ITRC to develop a proposed legislation settlement approach for the trust assets area that it would submit to Congress within one year after the ITRC is established. This language would require the ITRC to give the tribes several optional approaches for settling their claims, since each tribe=s situation in regard to trust asset losses is different. It would also permit the class of IIM account holders to opt in to this proposed procedure if they decided that would be preferable to the litigation approach they are presently following.

6.Add a new Subsection 105(b)(2)(E) which shall read as follows:

A(E) Approve all new regulations, policies and procedures of the Department of Treasury involving the management of tribal and individual Indian trust funds and direct that Department to revise any existing regulations, policies or procedures that the Corporation determines are not in compliance with the United States= trust responsibility to tribes or individual Indians.

Explanation:

The Treasury Department is also responsible for a portion of the mismanagement of trust funds and thus needs to be subject to the authority of the ITRC. While we do not recommend that the ITRC be given direct authority over Treasury, we do recommend that the ITRC be given the authority to approve all Treasury regulations, policies and procedures involving the Indian trust funds and the authority to require Treasury to revise any existing regulations, policies or procedures that do not meet trust standards.

7. Making the Special Trustee the Acting CEO of the ITRC and the OST Advisory Board the Acting Independent Members of the Oversight Board

7a.Change Section 105(c) [Management] to read as follows:

A(1) Chief Executive Officer. B There is established the office of the chief executive officer of the Corporation. The chief executive officer of the Corporation shall be appointed by the President, by and with the advice and consent of the Senate and shall serve ~~at the pleasure of the President~~ for a term of five years and may only be removed for cause. Pending the appointment and confirmation of the chief executive officer, the Special Trustee, appointed pursuant to Title III of the American Indian Trust Fund Management Reform Act (25 U.S.C. 4042) shall serve as the acting chief executive officer.@

7b.APending the appointment of the five independent members of the Oversight Board, the five incumbents on the Special Trustee=s Advisory Board, established pursuant to 25 U.S.C. 4046, who were appointed pursuant to subsection 4046(a)(1) of that section, shall serve in the capacity of the independent appointed members provided for by this subsection.@

Explanation:
It could take a long time for the President to appoint the CEO and the independent members of the Oversight Board. This would delay the start-up of the ITRC, which would be extremely destructive because it would let the Interior Department continue to squander the funds Congress has appropriated for trust reform. It is therefore recommended that pending the appointment of the CEO, the Special Trustee serve as the acting CEO. Similarly, pending the appointment of the five independent members of the Oversight Board, it is recommended below that the five tribal representatives on the Special Trustee=s Advisory Board act as the five independent members until the President fills those positions. Because the Special Trustee and the Advisory Board members are Presidential Appointees, they can be given new

authorities by legislation that are similar to their existing one without running into Constitutional problems. To avoid duplication, wee recommend that the Special Trustee=s Advisory Board go out of business upon the creation of the Oversight Board. It is also recommended that legislation provide that the CEO have a five year term and that he may be removed only for cause, rather than serve at the pleasure of the President. This will be continuity during changes of Administration.

8.

8a. Add a new subsection (3) to Section 105(e) [Additional Staff] which shall read as follows:

A(3) on any employment actions pursuant to the employing of additional staff or temporary services, the chief executive officer shall provide preference to Indians so long as he determines that such actions will be consistent with the Corporation=s trust responsibility.@

8b. To subsection (h) [ACorporate powers@], add a new subparagraph (13) which shall read as follows:

A(13) enter into such contracts as it deems necessary to carry out its responsibilities; provided that, such contracts shall be awarded pursuant to the provisions of 25 U.S.C. 47 (AThe Buy-Indian Act@) so long as he determines that such actions will be consistent with the Corporation=s trust responsibility.@

Explanation:

Since the ITRC will be assuming much of the functions now being carried out by the BIA, it should be subject to the Buy-Indian Act and Indian employment preference. The employment preference provision was drafted to give the CEO more discretion than now exists within the BIA, to ensure the ITRC can meet its trust responsibility. However, the experience of OTFM indicates that Indian preference is not a bar to effective trust management, so long as the managers are effective and use the Indian preference provision as intended.

9.Change Section 105(h)(6) so it reads as follows:

A Corporate Powers. B The corporation shall have the following powers:

(6) To sue under its own authority and be sued in its corporate capacity in any court of competent jurisdiction.@

Explanation:

See Explanation to changes to subsection 105(b)(2)(B) regarding the need to exclude the Justice Department from involvement, which among other things, requires that the Corporation have the ability to sue under its own authority, without requiring the approval of the Attorney General.

10.Change Section 105(h)9) at page 12, line 4 by adding the word Afunds@ between A the words trust@ and Aassets@ so it now reads, A...including uniform regulations governing the management of Indian trust funds and assets...@

Explanation:

The change makes it clear that the authority of the ITRC includes developing regulations for trust fund as well as trust asset management.

11.Add a new Section 105(h)(12), providing a new corporate power to the ITRC, which shall read as follows:

A(12) the development of a strategic plan for conducting the Corporation=s functions and activities@

In addition, take all of the language describing the contents of the strategic plan from Section 106(q), which gives the authority to develop the plan to the Oversight Board and put it under Section 105(h)(12), thereby giving the responsibility for the development of the plan to the Corporation. Section 106(q) would be changed to give the Oversight Board the role of reviewing and approving the strategic plan, but not developing it.

Section 105(h)(9) would have to be modified at page 12, line 1, to refer to Athe strategic plan established by the Corporation and approved by the Oversight Board under section 106(q)....@

Explanation:

It adds too much bureaucracy and will contribute to delay if the Oversight Board has to develop the strategic plan for the ITRC. The latter should have

this responsibility, with the Oversight Board having the authority to review and approve the plan.

12. Revise Section 106(e) (Compensation of the Oversight Board) as follows:

On line 7 p. 15. AThe independent members shall be paid at a daily rate determined by the President...@

Explanation:
The bill is not clear on whether the independent members positions constitute a full-time job or just require a limited number of days a year. It is recommended that they be part-time, so the positions can attract key tribal leaders. The proposed change makes it clear that they are being paid at a daily rate, which is the standard for members of Federal boards who work just a limited number of days a year.

13.Change Section 106(m) to read as follows:

AExcept with respect to one of the meetings required by subsection (n), nothing in this section shall preclude a member of the Oversight Board who is a public official from delegating his or her authority to an employee or officer of such member=s agency or organization if such employee or officer has been appointed by the President with the advice and consent of the Senate.@

Explanation:

Compelling the Chairman of the Federal Reserve Board and persons of similar stature to attend six meetings a year on Indian trust funds could generate unnecessary opposition to the bill. The proposed change would require the officials named in the bill to attend at least one meeting a year but to be able to delegate all other functions to presidentially appointed subordinates.

14.Change Section 106(q) to read as follows:

A(1) In general.-- The Oversight Board shall ~~develop~~ review and approve ~~a~~ the strategic plan for conducting the Corporation=s functions and activities that was developed by the Corporation.@

Explanation:

See Change above which recommends that the responsibility for developing the strategic plan be given to the ITRC and that the Oversight Board review and approve the plan.

15. Strike section 106(q)(2)(D), (requiring the Oversight Board to develop procedures for establishing the market value of trust assets.

Explanation:
There is no reason to further determine the market value of trust assets than already exists in common law.

16. Strike Subsections 107(a) ATransfer of Records: and 107(b) ATransfer of Functions and Responsibilities.@

Explanation:
With the actual Interior trust offices moving to the ITRC subsection (a) is no longer necessary. The issue of transfer was dealt with in proposed revised section

17. Revise Section 108(a) (Audits) so it reads as follows:

(A) AuditsB

(1) Annual AuditB ~~Notwithstanding section 9105 of Title 31, United States Code, the Comptroller General~~ An independent accounting firm shall annually audit the financial statements of the Corporation in accordance with generally accepted Federal Government auditing standards. Such audit firm shall be subject to suit by Indian account holders.

Explanation:

GAO generally does not express financial opinions. The audit needs to be done by an outside entity that is accountable, just the way a firm auditing a bank is accountable.

18. Change Section 108(a)(2) as follows:

A(2) Access to Books and RecordsB All books and records accounts, reports, files and property belonging to or used by the Corporation or the Oversight Board shall be made available to the Comptroller General and to the Tribal and individual Indian trust holders upon request.

Explanation:
Account holders should have full access to all records and files and should not face the problems that occurred when Arthur Andersen refused to release its work papers unless the tribe paid for them, this after Arthur Andersen had received over $21 million from the BIA to do a largely meaningless reconciliation.

19. Strike section 108(b)(2)(C) [requiring that the annual report include the number of Indian firms ITRC contracted with].This would no longer needed in light of the Buy-Indian Act provision that is proposed to be added.

20. In Section 108(c)(1)@ Additional Reports@, strike AApril 30", so that the ITRC and the Oversight Board have to submit reports only once a year. Otherwise the reporting load could overwhelm their other activities. For the same reason strike 108(d) ASupplemental Unaudited Financial Statements@. Also, strike 108(b(2)(F), a subsection requiring detailed reports on the utilization of Indian contractors. As mentioned above, the proposed inclusion of the Buy-Indian Act reduces the need for this reporting requirement.

21.Change Section 108(c)(2)(A)

(A) A statement of the total amount of all trust fund accounts ~~reconciled~~ resolved and the number of accounts yet to be ~~reconciled~~ resolved.

Explanation:

See Change # 2 which points out that Arthur Andersen has proven that a reconciliation is impossible.

22.Change Section 109 AFederal Trust Responsibilities@ to read as follows:

ANothing in this title shall be construed toB

.....

(2)diminish the trust responsibility of the United States with respect to trust account funds or trust assets.@

Explanation:

Since the ITRC is going to have responsibility over trust assets as well as funds, this change is necessary.

23. Revise Section 109 [Federal Trust Responsibility] as follows:
Put an (a) before ANothing in this title shall be construed toBA and then add a new subsection (b) which shall read as follows:

A(b)Federal courts are authorized to hear any suit in law or equity and to award equitable relief or damages for any breach of the United States= fiduciary obligations to tribes or Indians and the sovereign immunity of the United States is waived for such suits..@

Explanation:
The bill needs language permitting tribes and individual Indians to sue both the ITRC and the other Federal agencies that are managing Indian trust funds or assets, both for damages and equitable relief. The reason private trustees rigorously comply with their trust obligations is because they know they will and can be sued if they fail to do so. However, suing the United States for breach of trust, both for damages and equitable relief has been a major problem for tribes. The most egregious court decision on this issue was the recent one issued by the Court of Federal Claims in a breach of trust lawsuit brought by the Navajo Nation. The court found that the Secretary of the Interior grossly violated his fiduciary obligations as a trustee in handling certain coal leases, but went on to hold that it had no authority under any statute to award the Navajo Nation any damages for the losses it suffered as a result of the Secretary=s breach. Also, the courts have generally been less and less willing to find implied causes of action against the Federal government in any area, concluding that if Congress wanted to create a cause of action under a statute, it should include it in the statute. It is time that Indian trust beneficiaries had the same legal rights that are available to all other trust beneficiaries and time for the ambiguities in this area be cleared up. It is the best assurance that the horrendous trust mismanagement that occurred over

the past 150 years will not be repeated in the future. For these reasons, ITMA is recommending language that would not only permit the ITRC to be sued if it breaches its trust responsibility, but would permit suit against any Federal agency that has statutory trust responsibilities.@

24. Sunset Provisions

Strike all of Section 111, which would return the trust functions to the Interior Department once the accounts have been settled. It is the view of ITMA that there should not be a presumption that these functions are to be returned to the Interior Department once the reform and settlement is completed. That decision should be made from a clean slate at that time by Congress and the Indian tribes and individual account holders, based on the track record of the new entity.

25.Add a new Section 112 ANon Exclusive Remedy@ which shall read as follows:

ASection 112. Non-Exclusive Remedy
A tribe or IIM account holder that is unable to reach settlement with the ITRC on the most accurate accounting possible or which chooses not to engage in a settlement process with the ITRC shall retain its existing rights to litigate in a court of competent jurisdiction.@

Explanation:

A tribe or IIM account holder that is unwilling or unable to reach settlement with the ITRC should retain its right to litigate. While nothing in the draft specifically takes away that right, the bill should make this clear.

PART II. CHANGES TO TITLE II OF THE DISCUSSION DRAFT (Revised S. 739)

1. Generally B Incorporate the ITRC

In light of Title I of the Discussion Draft, which creates the ITRC, and transfers OTFM to the ITRC, then all of the functions that Title II now gives to the Secretary of the Interior under Title II, all of which are OTFM-related, need to

be assigned to the chief executive officer of the ITRC and all references to the Interior Department need to be changed to the ITRC.

2. Section 401(a) **B** IIM Account holders

Strike the term Aand individual Indians@. It is ITMA=s position that given the fact that the IIM accounts are now deep in litigation, it is not an appropriate time to provide for their outsourcing. ITMA hopes to be able to come back to the Committee in the future, once the litigation is no longer an issue, with recommendations for the investment of the IIM accounts.

3. The Default Position on whether a tribe must affirmative act in order for the investment of its funds to remain with OTFM or whether it must affirmatively opt for the investment of its funds to be outsourced -- Section 401

Under the present draft, after one year, the investment of a tribe=s trust funds automatically gets outsourced and invested pursuant to the prudent investor rule unless the tribe opts to continue to have its funds invested by OTFM or asks that the funds be outsourced but wants them invested in a manner other than, but no more risky than, the prudent investor rule. ITMA=s position on this key section depends on whether or not Title I is enacted, (under Title I OTFM will be transferred to the ITRC). If this happens, ITMA=s position is that a tribe=s funds should remain in OTFM (under the ITRC) until a tribe opts to have them outsourced, but that the ITRC should be tasked with the responsibility of working with each trust fund tribe to educate the tribe about its investment options under Title II of the 1994 Act, this title, the Self-determination Act, etc. and to help it to develop an investment strategy regarding how it wants its funds invested under the various options available; that is, does it want them to continue to be managed by OTFM where they can be invested only in 100% government guaranteed investments, outsourced under this Act to a private financial institution but remain in trust status, does it want to take them out of trust pursuant toTitle II of the Trust Fund Reform Act, etc.
However, if Title I does not pass and Title II is enacted independently, then ITMA endorses the present language in the Discussion Draft (providing for outsourcing unless the tribe affirmative requests its funds continue to be invested by OTFM) except we recommend that the bill increase from one year to three years the amount of time that must pass before the Secretary outsources the funds of a tribe that does not select an option. We take this position because if OTFM remains in Interior, we are not comfortable, based

on tribes experience with OTFM in regard to use of Title II of the 1994 Act, that tribes will receive accurate and unbiased information about their options. Proposed language for each option is set out below. We also recommend that the funds held in trust which tribes have refused to accept, be outsourced immediately under either option.

Option # 1, to be used if OTFM is under the ITRC
Strike subsections 401(a) (b) and (c) and replace them with the following:

A(a) Contracts B At the request of a tribe, the chief executive officer of the ITRC shall enter into a contract with a qualified (as determined by the ITRC) financial institution, to manage the investment of some or all the tribe:s trust funds. The chief executive officer shall afford the tribe an opportunity to designate the qualified financial institution it wishes to manage its funds under said contract and the manner in which its funds are invested so long as the funds are invested in a manner that does not exceed the prudent investor rule as established in the jurisdiction in which the financial institution is located. Unless a tribe designates a specific institution, the chief executive officer shall select a qualified financial institution, giving preference to financial institutions that are 51% or more owned and controlled by tribes or individual Indians. Unless a tribe designates the manner in which its funds are to be invested, the funds shall be invested in a manner consistent with the prudent investor rule of the jurisdiction in which the financial institution is located.

(b) Within one year after the establishment of the ITRC, officials of the ITRC and OTFM shall meet with each tribe that has funds managed in trust by OTFM to educate the tribe about its investment options under the various titles of this Act and the Self-Determination Act and to assist the tribe develop and implement a plan for the investment of its funds, utilizing whichever option the tribe so chooses.

Option # 2, to be used if OTFM remains within the Interior Department.

Retain subsections 401(a)(b)(c) but revise it as follows:

A(a)Contracts.-- Not later than ~~1~~ 3 years after the date of enactment of this title, or sooner if so requested by a tribe, the Secretary, with the advice and assistance of the Comptroller of the Currency, shall enter into contracts with qualified financial institutions, that are regulated by a Federal bank regulatory

agency, for the investment of all funds presently managed in trust status for Indian tribes and individual Indians ....@

4.Section 401(d) B If Option # 1 is used, strike subsection 401(d)(1) and (2). If Option 2 is used, retain those two subsections.

5. Under either option. Revise Section 401(h) as follows:

A(h) NO SETTLEMENT.--

(1) The management of the investment of any trust funds now managed by the Office of Trust Funds Management for which a tribe(s) has refused to accept ownership, shall, after notification to such tribe(s), be contracted to one or more private financial institutions, with a preference to institutions that are 51% or more owned and controlled by Indian tribes or individual Indians. Such funds shall be invested pursuant to the Prudent Investor Rule of the jurisdiction in which said institution(s) is located.

(2) The outsourcing of the investment of any funds under this Title shall notB (i) constitute, and shall not be interpreted as constituting, for any purpose, the acceptance by an Indian tribe or individual Indian account holder of a settlement of any claim that such tribe or individual Indian account holder has not otherwise accepted; and

(ii)otherwise alter, in any manner, the legal status of such funds.

Explanation:

This would require the outsourcing of trust funds tribes have refused to accept, while making it clear that such outsourcing does not constitute any form of acceptance of those funds by such tribes. This section should be include regardless of which option is chosen under paragraph 3 above.

6. Under either option, add the underlined text to the end of subsection 401(d)(4) and to the end of Section 401(e)(2) so they read as follows:

A(d)(4) require that the financial institution be liable for any financial losses incurred by the trust beneficiary as a result of its failure to comply with the terms of its contract, the investment instructions provided by the tribe, its general fiduciary obligation, or the prudent investor rule. The financial institution shall not be liable for any financial losses incurred by the trust beneficiary that occurred as a result of investment activities carried out by the financial institution in a manner that was consistent either with the investment instructions provided by the tribe and approved by the Secretary, or, if the tribe did not provide any such instructions, with the provisions of this Act;@

A(e)(2) LOSSES. B The Secretary shall be responsible for any losses incurred by a trust beneficiary for which a financial institution is liable under subsection (d)(4) but shall be entitled to subrogation of any claim to the extent the beneficiary receives compensation from the United States. The United States shall not be liable for any financial losses incurred by the trust beneficiary that occurred as a result of investment activities carried out by the financial institution in a manner that was consistent either with the investment instructions provided by the tribe and approved by the Secretary, or, if the tribe did not provide any such instructions, with the provisions of this Act;@

Explanation:

Assistant Secretary Gover told ITMA that he could support legislation (not necessarily Title IV as drafted) that gave tribes private sector options for the investment of their trust funds, so long as the United States= liability was reduced accordingly. We agree and have drafted proposed language that would do so. The proposed additional language in these two paragraphs would make it clear that neither the financial institution nor the United States bears any liability for losses that the tribe incurred from investments that satisfied the prudent investor rule or the investment plan developed by the tribe and approved by the Secretary.

7.Add a new Subsection 401(d)(8) which shall read as follows:

A(d) Requirements of Contracts.-- Any contract entered into [with a financial institution to manage the investment of trust funds] under this section shall, at a minimum, include provisions acceptable to the Secretary that willB

.....

(8) require the financial institution to sponsor a Amini-bank@ or similar financial literacy program in the schools on the reservation of each tribe whose trust funds it is investing;@

Explanation:

As the Blackfeet National Bank has demonstrated, a mini-bank program is an excellent way to prepare the next generation of tribal members to be knowledgeable about banking. Sponsoring such a program is not expensive and is an appropriate responsibility for a financial institution that is profiting from the investment of that tribe=s trust funds.

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